IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0085

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD WEISWEAVER,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twenty-First Judicial District Court,
Ravalli County, The Honorable Jeffrey H. Langton, Presiding

APPEARANCES:

JOSLYN HUNT
Chief Appellate Defender
SARAH CHASE ROSARIO y NABER
Assistant Appellate Defender
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

ATTORNEYS FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

GEORGE HENRY CORN
Ravalli County Attorney
Ravalli Co. Courthouse
205 Bedford Street Suite C
Hamilton, MT 59840

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUE

Did Appellant/Defendant receive ineffective assistance of counsel at sentencing when his attorney failed to object or move the court for reconsideration of its failure to follow the legislative mandates of Mont. Code Ann. § 46-18-225?

STATEMENT OF THE CASE AND FACTS

Detective David Boyd (Boyd) of the Bakersfield Police Department in California is part of a small unit that performs parcel interdictions, focusing on illicit funds drugs. (Tr. at 124-31.) On May 7, 2009, Boyd obtained a search warrant for a suspicious package. (Tr. at 129-30.) The package was addressed person-to-person, to be shipped overnight, and was paid for in cash. (Tr. at 131-33.) The sending address was a vacant, boarded up house. (Tr. at 131.) A narcotics trained dog alerted the presence of narcotics in the package. (Tr. at 135.) The package was addressed to Sean Snow (Snow) at 1007 Bass Lane, Corvallis, Montana. (Tr. at 138.) Boyd opened the package and determined 29 grams of methamphetamine was inside. (Tr. at 140-41.) Boyd contacted Hamilton Duputy Basnaw (Basnaw) and advised him of the package. (Tr. at 142-43.) Boyd and Basnaw coordinated a controlled delivery, whereby Boyd overnighted the package to Basnaw inside a larger box. (Tr. at 143-44.)

On May 8, 2009, Deputy Sheriff Scott Newell (Newell), of the Missoula County Sherriff's office, and an attached detective to the High Intensity Drug

Trafficking Area task force in Missoula, coordinated with Basnaw to deliver the package to Snow's address. (Tr. at 162-65.) Newell delivered the package to Snow and had Snow sign for it. (Tr. at 171.) Several officers from local agencies were involved in the execution of the search warrant on Snow's home after he signed for the package. (Tr. at 172.) While Snow and his mother were being interviewed on scene, Weisweaver was in contact with Snow via cell phone and text message, regarding his desire to get the package from Snow. (Tr. at 173-74.)

Weisweaver was arrested on May 8, 2009, as he approached Snow's house to retrieve the package. (Tr. at 194.) Weisweaver was initially detained because of officer knowledge of his communications with Snow. Upon preliminary search for officer safety, Weisweaver possessed methamphetamines and marijuana, and was subsequently arrested. (Tr. at 195.)

Pursuant to further investigation, the cell phone and text message logs of Weisweaver and Snow demonstrated contact and discussion of the cost of the methamphetamine, payment to Weisweaver's mother in California for the methamphetamine, and the FedEx shipping number of the package sent to Snow's house. Additionally, documentation of Moneygrams used for payment from Weisweaver to his mother were discovered. (Tr. at 25-87.)

By Information filed May 19, 2009, the State charged Weisweaver with Criminal Possession of Dangerous Drugs, a felony, in violation of Mont. Code

Ann. § 45-9-102(1) and (6); Accountability: Criminal Distribution of Dangerous Drugs, a felony in violation of Mont. Code Ann. §§ 45-2-302(3) and 45-9-101(4); and Conspiracy: Criminal Possession with Intent to Distribute, a felony, in violation of Mont. Code Ann. §§ 45-4-102(1) and 45-9-103(3); or in the alternative, Accountability: Criminal Possession with Intent to Distribute, a felony, in violation of Mont. Code Ann. §§ 45-2-302(1) and (3) and 45-9-103(3). Subsequent to jury trial held November 2, 3, and 5, 2009, Weisweaver was convicted of Criminal Possession of Dangerous Drugs, a felony, in violation of Mont. Code Ann. § 45-9-102(1) and (6) and Conspiracy: Criminal Possession with Intent to Distribute, a felony, in violation of Mont. Code Ann. §§ 45-4-102(1) and 45-9-103(3). (Tr. at 108.)

In his sentencing memorandum filed December 22, 2009, and at the sentencing hearing held on December 23, 2009, counsel for Weisweaver advised the court that Weisweaver was a non-violent felony offender, and moved the court to sentence him pursuant to the Alternative Sentencing Authority statute, Mont. Code Ann. § 45-9-202. (D.C. Doc. 79; Tr. at 12.) Specifically, Weisweaver moved the court for a curative sentence under the supervision of the Department of Corrections, with an order for screening into the Connections Corrections Program in Butte, with a one year commitment to the Connections Corrections Program, and an additional year at the Butte Pre-Release Center, with fines as set forth in the

PSI, and three years of probation upon release from the Pre-Release Center according to the probation conditions as set forth in the PSI, and 2,000 hours of community service. (D.C. Doc. 79; Tr. at 12.)

The State had provided notice of intent to seek persistent felony offender status on June 25, 2009, based on a 2008 felony conviction of Weisweaver in California, involving receipt of stolen property. (D.C. Doc. 12.) The court noted that after conviction, Weisweaver had been shot in the abdomen and returned to his family in Montana without having his probation from California transferred. (Tr. at 16.) The court noted that trial testimony from an inmate housed with Weisweaver disclosed an intent to sell the methamphetamine. (Tr. at 17.) The court declared Weisweaver was clearly not entitled to any consideration under the alternative sentencing authority and that he is clearly a persistent felony offender. (Tr. at 18.) The court conceded Weisweaver apparently has a methamphetamine addiction problem which could potentially be treated, but that methamphetamine addiction requires lengthy treatment, is not something that can occur in a short-term program, and should be done in a secure setting. (Tr. at 18.) The court then sentenced Weisweaver as a persistent felony offender, to five years for criminal possession of dangers drugs, and to fifteen years with five years suspended for conspiracy with intent to distribute, concurrent. (Tr. at 19.) Counsel for

Weisweaver did not object or move the court for reconsideration of its sentence pursuant to the mandates of Mont. Code Ann. § 46-18-225. (Tr. 15-20.)

SUMMARY OF THE ARGUMENT

Weisweaver received ineffective assistance of counsel at the sentencing hearing. Counsel failed to object or move for reconsideration of the court's failure to examine and take into account the ten specific criteria applicable to non-violent felony offenders as set forth in Mont. Code Ann. § 46-18-225. (Tr. at 19-20.) Weisweaver was prejudiced by Counsel's ineffective assistance, because a reasonable probability exists that had the objections or motions for reconsideration been made, the court would have sentenced Weisweaver to a less-restrictive placement than prison.

STANDARD OF REVIEW

A claim of ineffective assistance of counsel contains mixed questions of law and fact that this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

ARGUMENT

The Sixth Amendment of the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24 of the Montana Constitution guarantees a person the right to effective assistance of counsel. To evaluate claims of ineffective assistance of counsel, this Court has adopted the

two-pronged test from *Strickland v. Washington*, 466 U.S. 668 (1984). *Kougl*, ¶ 11.

This two-pronged test requires the defendant to establish that (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Kougl*, ¶ 11. There exists a strong presumption that counsel's performance was based on sound trial strategy that falls within the broad range of reasonable professional conduct. *State v. Hendricks*, 2003 MT 223, ¶ 7, 317 Mont. 177, 75 P.3d 1268 (citations omitted).

This Court makes a distinction between record-based and non-record-based claims of ineffective assistance of counsel. *State v. Bateman*, 2004 MT 281, ¶ 23, 323 Mont. 280, 99 P.3d 656. Generally, this Court asks "why" counsel did or did not perform as alleged, and then this Court seeks to answer the question by reference to the record. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. In order for counsel's actions to constitute ineffective assistance, those actions must stem from neglect or ignorance, rather than informed, professional deliberation. *State v. Gonzales*, 278 Mont. 525, 532, 926 P.2d 705, 710 (1996).

This Court has stated that direct appeal is the proper forum to address record-based actions or those that are obligatory but not taken, or those that are

taken, but implausible. *Kougl*, ¶¶ 14-19. More specifically, this Court has stated the following:

> Sometimes, however, it is unnecessary to ask "why" in the first instance. An example of this is when counsel is faced with an obligatory, and therefore non-tactical, action. . . . Then the question is not "why" but "whether" counsel acted, and if so, if counsel acted adequately. The answer may or may not be in the record. Another example, present here, is the relatively rare situation where there is "no plausible justification" for what defense counsel did. . . . This can occur even in situations . . . that generally rely on non-record material. *See White* [*State v. White*, 2001 MT 149, 306 Mont. 58, 30 P.3d 340], PP18-19 (listing, *inter alia,* "the failure to fully inform a defendant of the consequences of his various options and rights" and "the failure of counsel to offer a particular jury instruction" as examples of claims that are generally non-record based). Whether the reasons for defense counsel's actions are found in the record or not is irrelevant. What matters is that there could not be any legitimate reason for what counsel did.

Kougl, ¶ 15.

Counsel for Weisweaver informed the court that Weisweaver is a non-violent felony offender as defined by Mont. Code Ann. § 46-18-104(3). (Tr. at 12.) Non-violent felony offenders must be sentenced pursuant to Mont. Code Ann. § 46-18-225. (Attached as Ex. A.) "Section [46-18-] 225 requires consideration of such things as *where the needs of the offender would be best served*. These statutes *do not provide the court with any discretion*. The legislature has directed trial courts to make these considerations before any nonviolent offender is incarcerated." *State v. LaMere*, 272 Mont. 355, 900 P.2d 926 (1995) (emphasis added). The court erred when it failed to examine and take into account the ten

specific criteria set forth in Mont. Code Ann. § 46-18-225. *State v. Swoboda*, 276 Mont. 479, 918 P.2d 296 (1996); *State v. Savaria*, 274 Mont. 197, 906 P.2d 215 (1995); *LaMere*; *State v. Nelson*, 906 P.2d 663 (1995); *State v. Stevens*, 259 Mont. 114, 115, 854 P.2d 336, 337 (1993). The court failed to state reasons why alternatives to imprisonment were not selected, based on the criteria in Mont. Code Ann. § 46-18-225(2).

Counsel failed, however, to move the court to follow the law and examine and take into account the ten criteria specified in Mont. Code Ann. § 46-18-225. Counsel also failed to request the court state reasons why alternatives to imprisonment were not selected, based on the criteria in Mont. Code Ann. § 46-18-225(2). No plausible tactical reason exists for counsel's failure to object or move for reconsideration of the court's sentence. Pursuant to *Strickland*, counsel's assistance was ineffective and prejudiced Weisweaver. There is a reasonable probability that, had the court examined and taken into account the ten criteria, Weisweaver would have received a less-restrictive sentence than imprisonment at the Montana State Prison.

At the sentencing hearing, the district court stated that Weisweaver has a methamphetamine addiction problem, but that methamphetamine addiction is "not something that can occur in a short-term program." (Tr. at 18.) The Department of Corrections states on its website that the average inmate completes the

methamphetamine addiction treatment program through Nexus in approximately nine months. (Attached as Ex. B.) Moreover, the Department of Corrections oversees the Connections Corrections Programs, which treat offenders with substance abuse problems. Had the district court considered the ten criteria, there is a reasonable probability it would have found Weisweaver's needs could be better served in a facility or program other than state prison.

The district court also stated that Weisweaver had received a felony conviction in November of 2008 for receipt of stolen property, and noted that he had left California without permission, to return to his father's family in Montana after being shot in the abdomen, while on probation for that charge. (Tr. at 16.) Had the district court considered the mandatory criteria, there is a reasonable probability it would have found that the needs of public safety do not truly require the level of security provided by imprisonment in state prison.

Further, the district court stated that Weisweaver had only misdemeanor traffic violations prior to his move to California to be with his mother. Had the district court considered the mandatory criteria for sentencing a non-violent felony offender, there is a reasonable probability it would have found that the relocation to California led or contributed to the methamphetamine addiction (Weisweaver's mother sent the subject methamphetamine to Montana (Tr. at 164-69)), and his receipt of stolen property, and thus, his criminal conduct was the result of

circumstances that are unlikely to recur here in Montana. Consequently, had the district court considered the mandatory criteria for sentiency a non-violent felony offender, there is a reasonable probability, it would have considered an alternative, less-restrictive sentence that imprisonment at the Montana State Prison.

Given that Weisweaver's counsel sought to have his sentence be a curative sentence, rather than a punitive sentence, failing to object or move for reconsideration was ineffective for the same reasons that the court's failure to observe those requirements was plain error: The statutes and authorities making it obligatory for a court to examine and consider the non-violent felony offender sentencing criteria pursuant to Mont. Code Ann. § 46-18-225, and counsel's obligation to object or move for reconsideration in order to preserve the issue for appeal, were clear at the time of the sentencing hearing.

Manifest in counsel's duty to be an effective advocate is the knowledge of applicable procedure and law. "'Although counsel need not be a fortune teller, he must be a reasonably competent legal historian. Though he need not see into the future, he must reasonably recall (or at least research) the past. . . .' *Kennedy*, 725 F.2d 272 (quoting *Cooks v. United States*, (5th Cir. 1972), 461 F.2d 530, 532)," *State v. Becker*, 2005 MT 75, ¶ 19, 326 Mont. 364, 110 P.3d 1. Based on this Court's long line of precedent outlining procedure for preserving sentencing issues

on appeal[1], counsel for Weisweaver could not have had any legitimate reason for failing to object or move for reconsideration of Weisweaver's sentence.

In *Brister*, this Court reiterated its long held rule that failure to make an objection constitutes waiver, and the *Lenihan* exception to the rule:

> This Court has stated on numerous occasions that a defendant must raise an objection in a timely manner or the objection is waived and this Court will not hear it on appeal. See, e.g., *State v. Baker*, 2000 MT 307, ¶ 30, 302 Mont. 408, 414, 15 P.3d 379; *State v. Harris*, 1999 MT 115, ¶ 11, 294 Mont. 397, 399, 983 P.2d 881. Additionally, we have repeatedly stated that an important purpose of contemporaneous objections is to give the trial judge the first opportunity to correct any error. See *State v. Tucker*, 2000 MT 255, 301 Mont. 466, 10 P.3d 832; *State v. Clausell*, 2001 MT 62, 305 Mont. 1, 22 P.3d 1111; *State v. Finley* (1996), 276 Mont. 126, 915 P.2d 208 (overruled in part on other grounds by *State v. Gallagher*, 2001 MT 39, 304 Mont. 215, 19 P.3d 817); *State v. Weinberger* (1983), 204 Mont. 278, 665 P.2d 202.

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[1] Of note is the more recent case of *State v. Barnaby*, 2006 MT 203, ¶¶ 56-59, 333 Mont. 220, 142 P.3d 809. Here, this Court admonished the district court for failing to discuss the criteria in Mont. Code Ann. § 46-18-225 and failing to address why alternatives to imprisonment were deemed inappropriate by the district court, and vacated his sentence, remanding for further consideration in light of the criteria. However, this Court did not address whether Barnaby's trial counsel preserved the issue for appeal by objection or motion for reconsideration, and neither do the briefs of the parties.

In *Barnaby*, this Court properly applied statutory construction and concluded that a sentence decreed in violation of statutory mandates is a sentence beyond statutory authority, and therefore must be vacated and remanded with an order to follow the mandate of law. This Court acknowledged the sentencing issue in *Barnaby* pursuant to the *Lenihan* exception as exceeding statutory mandates. However, because *Barnaby* stands in isolation from, and in opposition to, the line of precedent borne of *Stevens*, it is apparent that these two lines must be addressed by this Court to prevent further confusion regarding the necessity to object at sentencing to a sentence that is either illegal or exceeds statutory mandates.

> Notwithstanding the wisdom of this rule, this Court has established a narrow but important exception. In *State v. Lenihan* (1979), 184 Mont. 338, 602 P.2d 997, we held that "the better rule [is] to allow an appellate court to review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *Lenihan*, 184 Mont. at 343, 602 P.2d at 1000. Thus, even if a defendant fails to contemporaneously object at sentencing, we will accept jurisdiction of an appeal that has been timely filed which alleges that a sentence is illegal or exceeds statutory authority.

State v. Brister, 2002 MT 13, ¶¶ 15-16, 308 Mont. 154, 41 P.3d 314.

Despite the mandatory language of Mont. Code Ann. § 46-18-225, this Court held in *Nelson* that a district court's failure to enforce or adhere to the law did not create an illegal sentence appealable under the *Lenihan* exception. *Nelson*, 906 P.2d at 668. Instead, this Court held in *Nelson* and in *Swoboda*, that a district court's failure to adhere to the law rendered a sentence, "subject to challenge or objection." This Court reasoned that so long as the sentence otherwise was not in excess of the statutory maximum, a district court's violation of statutory mandates does not create an illegal sentence. *Nelson*, 906 P.2d at 668; *Swoboda*, 276 Mont. at 484, 918 P.2d at 299. In the case at bar, because the district court failed to consider Mont. Code Ann. § 46-18-225, but sentenced Weisweaver within the statutory maximums for his convictions, the sentence was not illegal, but rather, a legal sentence only subject to challenge or objection.

CONCLUSION

When Weisweaver's counsel failed to object or move the court for reconsideration, he foreclosed the opportunity for a less-restrictive sentence for his client. Counsel also foreclosed Weisweaver's ability to directly appeal his sentence, because failure to object waives the opportunity to raise an issue on appeal. *Swoboda*, 276 Mont. at 485, 918 P.2d at 300. There being no plausible reason for counsel to fail to object, counsel was clearly ineffective at the sentencing hearing. Weisweaver was prejudiced because there is a reasonable probability that his sentence would have been less restrictive had counsel objected or moved the court to consider the mandates of the sentencing statute applicable to non-violent felony offenders. Accordingly, this Court should assign new counsel and remand for resentencing in accordance with the law.

Respectfully submitted this ____ day of June, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Appellate Defender Office
139 N. Last Chance Gulch
P.O. Box 200145
Helena, MT 59620-0145

By: _____
Sarah Chase Rosario y Naber
Assistant Appellate Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

GEORGE HENRY CORN
Ravalli County Attorney
Ravalli Co. Courthouse
205 Bedford Street Suite C
Hamilton, MT 59840

DONALD WEISWEAVER 3004063
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

Sarah Chase Rosario y Naber

APPENDIX